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NO. 94-881

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION.....PETITIONER

VS.

DARREL WAYNE HILL.....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

DARREL WAYNE HILL
RESPONDENT

BY: RAY HARTENSTEIN
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ARKANSAS BAR NO. 77061
10 SHEPARD COURT
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REASON FOR DENYING THE WRIT

The United States District Court for the Eastern District of Arkansas granted respondent Hill habeas corpus relief, finding respondent received constitutionally significant ineffective assistance of counsel at both the guilt and sentencing phases of his trial, and, further, that Hill was prejudiced at the sentencing phase of his trial by the improper submission to the jury of lesser included offenses for enhanced punishment, which, in turn, allowed the prosecutor to improperly argue three non-violent prior felonies as a justification for the jury's imposition of the death penalty. Hill v. Lockhart, 824 F. Supp. 1327 (E.D. Ark. 1993). On appeal, the Eighth Circuit reinstated Hill's capital and non-capital convictions, finding Hill was not sufficiently prejudiced by trial by counsels' constitutionally deficient performance to warrant relief at the guilt stage of his trial, but affirming the district court's finding of constitutionally significant ineffective assistance of counsel at the sentencing phase. Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994). Because of its finding Hill received constitutionally significant ineffective assistance of counsel at the sentencing phase, the Eighth Circuit did not, and did not need to, address the issue of prejudice stemming from the other, undisputed errors which occurred during the sentencing phase. Id., at 834.

Petitioner seeks review in this Court of the court of appeals' failure to address what it terms an "unresolved" issue which "unquestionably" will recur at the resentencing trial

ordered by that court. As will be discussed further herein, the issues of the propriety of submitting the lesser included offenses for enhanced punishment and allowing argument concerning the existence of prior, non-violent felonies as a justification for imposition of the penalty of death are neither "unresolved" nor likely to recur at any resentencing trial if Arkansas state law is followed.

The crux of petitioner's argument is that the Eighth Circuit should have addressed the issue of whether the district court correctly found error in the procedures employed in the sentencing phase of Hill's trial. Petitioner characterizes this issue as an "unresolved" issue under Arkansas law, and because "unresolved", likely to recur at any resentencing trial unless the Eighth Circuit is ordered to address the merits of the issue.

It is firmly established by Arkansas statute that when a criminal offense, by definition, includes a lesser included offense, a conviction cannot be had for both offenses. Ark. Stat. Ann. §41-105 (1)(a) and (2)(a) (Repl. 1977) (now codified as Ark. Code Ann. §5-1-110 (1987)). Relying on this statute, the Arkansas Supreme Court found error in the submission to the jury of the lesser included offenses as separate, substantive offenses for enhanced punishment on Hill's direct appeal and in his postconviction proceedings. Hill v. State, 628 S.W.2d 284 (Ark. 1982) and Hill v. State, 644 S.W.2d 282 (Ark. 1983). In finding error in this regard, the district court merely affirmed existing state court precedent. Hill v. Lockhart, 824 F. Supp. at 1333.

In fact, the error in submitting the lesser included offenses for enhanced punishment was conceded throughout the habeas proceedings. This issue is clearly not "unresolved" and there was no reason for the Eighth Circuit to address it.

Similarly, it is equally firmly established under Arkansas law that it is error to allow evidence, or argument, during the sentencing phase concerning prior crimes that do not involve the use or threat of violence or create a substantial risk of death or serious physical injury to another person to either establish an aggravating circumstance or justify the death penalty. Ford v. State, 633 S.W.2d 3 (Ark. 1982), cert. denied, 459 U.S. 1022. By statute, in order for a prior offense to be admissible as an aggravating circumstance or to justify a sentence of death, the prior felony must involve the use or threat of violence or create a substantial risk of death or serious physical injury. Ark. Stat. Ann. §41-1303 (Repl. 1977) (now codified as Ark. Code Ann. §5-4-604 (1987)). It is also improper to use prior, non-violent felonies for the purpose of anticipating a showing of a lack of prior convictions as a mitigating circumstance. Ford v. State. In finding error, the district court again merely followed existing state law precedent. Hill v. Lockhart, 824 F. Supp. at 1335.

The district court noted that the state supreme court had failed to address the issue of prejudice to Hill's right to a fair trial on the issue of punishment resulting from these sentencing errors. Hill v. Lockhart, 824 F. Supp. at 1333-34.

See, Ford v. Arkansas, 459 U.S. 1022 (1982) (Marshalll, J., dissenting) (criticizing the Arkansas Supreme Court's "cavalier use of the harmless error doctrine" and noting that "[c]riteria set forth in a statute serve no purpose if prosecutors are free to ignore them"). There being no dispute but that sentencing error did occur, counsel for petitioner and respondent agreed at the district court level that the only real issue for decision was that of resulting prejudice. The district court was invited to address that issue, and did, concluding the errors had a substantial and injurious effect or influence on the jury's sentencing decision. Hill v. Lockhart, 824 F. Supp. at 1336. On appeal to the Eighth Circuit, it was the district court's finding of prejudice that petitioner questioned, not the legal predicate for its determination that error occurred in the sentencing proceedings.

Because the legal precedents for the district court's finding of error in the sentencing phase of Hill's trial are firmly established, undisputed, and not "unresolved", there was no need for the Eighth Circuit to address the issue of whether there was sentencing phase error, and there is no likelihood the errors will recur at any resentencing trial. Further, because of the court of appeal's finding of constitutionally significant ineffectiveness of counsel at the sentencing phase, a finding petitioner does not challenge, there was no need to address or question the district court's finding of prejudice, **precisely** because of the unlikelihood such errors would recur upon retrial.

CONCLUSION

For the reasons and authorities set forth herein, it is submitted that the issue of whether sentencing phase error occurred in Hill's trial is firmly established under state law and is in no way unresolved, thereby rendering the likelihood that such would again become an issue at any resentencing trial a nullity. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

DARREL HILL
RESPONDENT

BY:

RAY HARTENSTEIN
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CERTIFICATE OF SERVICE

I, Ray Hartenstein, a member of the Bar of this Court and counsel for Respondent, do hereby certify that a copy of Respondent's Brief in Opposition has been served upon counsel for Petitioner, Winston Bryant, Attorney General for the State of Arkansas, by placing a copy of same in the United States mail, postage prepaid, to Winston Bryant, Attorney General, 200 Tower Building, 323 Center Street, Little Rock, Arkansas 72201 this 23rd day of November, 1994.

Ray Hartenstein
RAY HARTENSTEIN

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November 22, 1994

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

Re: A.L. Lockhart, Director, Arkansas Department of Correction,
v. Darrel Wayne Hill
No. 94-881

Dear Mr. Suter:

Pursuant to Rule 46, please find enclosed Brief for Respondent in Opposition to Petition with Certificate of Service. Counsel has previously been appointed to represent Respondent Hill in the district court and court of appeals.

Please advise if you have any questions concerning this filing.

Sincerely,

Ray Hartenstein

Ray Hartenstein

Enclosure